Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-561 OF 1997
KAMALANATHAN RATNAM J
11 FEBRUARY 2000

Civil Procedure *— Appearance — Conditional appearance — Application for stay of further proceedings — Unchallenged denial of publication to third party in Malaysia of defamatory letters — Whether court has jurisdiction to try action*

Tort *— Defamation — Publication of libellous letters — Whether publication to third party in Malaysia*

The plaintiffs sued the defendants for libel in respect of two publications made by the defendants. The plaintiffs then applied ex parte for and obtained an order dated 19 March 1998 to issue and serve a notice of writ outside jurisdiction and that the defendants be given 30 days to enter appearance from the date of service of the writ on them. The defendants then applied ex parte for leave to enter conditional appearance and for a stay of all further proceedings until determination of the defendants' application to set aside or strike out the writ and statement of claim. The defendants stated in their affidavit in support that the alleged publication was not made in Malaysia and that the onus was upon the plaintiffs to establish that the publications were indeed done to third parties other than to the plaintiffs in Malaysia before the cause of action in libel accrued. The defendants also contended that Malaysia was not the forum conveniens. The senior assistant registrar ('the SAR') dismissed the application with costs and directed the defendants on 14 September 1999 to file the defence within 14 days from the date of the order. The defendants appealed.

Held, allowing the appeal with costs and setting aside the decision of the SAR and the action:

In order to establish that the court has jurisdiction to try the action, the plaintiffs have to prove that the two defamatory letters were published in Malaysia. In order to constitute publication in Malaysia, the plaintiffs were required to prove that the letters were published to a third party in Malaysia and not just to the plaintiffs. Since the affidavit of the first defendant clearly denied any publication to any third party and since there was no challenge to that denial, such denial was accepted as true and thus acceded to the defendants' application (see p 426F–G).

[Bahasa Malaysia summary

Plaintif-plaintif telah mendakwa defendan-defendan untuk libel berkenaan dengan dua penerbitan yang dibuat oleh defendan-

defendan. Kemudian plaintif-plaintif memohon secara ex parte untuk dan memperolehi suatu perintah bertarikh 19 Mac 1998 untuk mengeluarkan dan menyampaikan notis writ di luar bidang kuasa dan bahawa defendan-defendan diberikan 30 hari untuk memasuki kehadiran dari tarikh penyampaian writ ke atas mereka. Kemudian defendan-defendan memohon secara ex parte untuk kebenaran memasuki kehadiran bersyarat dan untuk penggantungan semua prosiding selanjutnya sehingga keputusan permohonan defendan untuk mengetepikan atau membatalkan writ dan pernyataan tuntutan. Defendan-defendan menyatakan di dalam afidavit sokongan bahawa penerbitan yang dikatakan tidak dibuat di Malaysia dan bahawa beban adalah di atas plaintif-plaintif untuk membuktikan bahawa penerbitan-penerbitan sememangnya dibuat kepada pihak ketiga selain daripada plaintif-plaintif di Malaysia sebelum kausa tindakan libel terakru. Defendan-defendan juga menegaskan bahawa Malaysia bukanlah forum konveniens. Penolong kanan pendaftar ('PKP tersebut') menolak permohonan tersebut dengan kos dan mengarahkan defendan-defendan pada 14 September 1999 untuk memfailkan pembelaan di dalam masa 14 hari dari tarikh perintahnya. Defendan-defendan telah merayu.

Diputuskan, membenarkan rayuan tersebut dengan kos dan mengetepikan keputusan PKP dan tindakan tersebut:

Untuk membuktikan bahawa mahkamah mempunyai bidang kuasa untuk membicara tindakan tersebut, plaintif-plaintif mestilah membuktikan bahawa kedua-dua surat fitnah diterbitkan di Malaysia. Untuk terjumlah kepada penerbitan di Malaysia, plaintif-plaintif diperlukan untuk membuktikan bahawa surat-surat tersebut diterbitkan kepada pihak ketiga di Malaysia dan bukan kepada plaintif-plaintif sahaja. Oleh kerana afidavit defendan pertama dengan jelas menafikan sebarang penerbitan kepada pihak ketiga dan oleh kerana tiada cabaran kepada penafian tersebut, penafian tersebut diterima sebagai benar dan dengan itu menyetujui permohonan-permohonan defendan (lihat ms 426F–G).]

Notes

For cases on conditional appearance, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 967–972.

For cases on publication in defamation, see 12 Mallal's Digest (4th Ed, 1996 Reissue) paras 212–216.

Legislation referred to

Rules of the High Court 1980 O 12 r 7

Lorraine Cheah (*Jyoti Sharma* with her) (*Shearn Delamore & Co*) for the appellant/defendant.

Harjit Singh Pannu (*Gill & Tang*) for the respondent/plaintiff.

Kamalanathan Ratnam J:

Facts

The plaintiffs sued the defendants for libel in respect of two publications made by the defendants. The plaintiffs then applied ex parte for and obtained an order dated 19 March 1998 to issue and serve a notice of writ outside the jurisdiction, that is to the defendants' address in London and that the defendants be given 30 days to enter appearance from the date of service of the writ on them.

The defendants then applied ex parte for leave to enter conditional appearance and for a stay of all further proceedings until determination of the defendants' application to set aside or to strike off the writ and statement of claim. The defendants stated in their affidavit in support of the ex parte application that the alleged publication was not made in Malaysia and that the onus was upon the plaintiffs to establish that the said publications were indeed done to third parties other than to the plaintiffs in Malaysia before the cause of action in libel accrued. The defendants also contended that Malaysia was not the forum conveniens. The senior assistant registrar ('SAR') dismissed the said application with costs and directed the defendants on 14 September 1999 to file the defence within 14 days from the date of her order. The defendants appealed against the said order.

The defendants then filed an application for stay of these proceedings until the appeal was heard. On 8 October 1999, the defendants withdrew the said application for stay. On 26 October 1999, I heard the appeal. I set aside the decision of the learned SAR and allowed the appeal with costs. The plaintiff has since appealed against my said decision.

The evidence in support

The first defendant affirmed an affidavit both on his behalf and on behalf of the second defendant. He averred that all the facts he had deposed to were from his personal knowledge or were from the records of the second defendant to which he had unrestricted access, except where specified. He confirmed that he was residing at the address stated in London, and that the second defendant was incorporated in the USA and had its registered place of business in London. He affirmed under oath that although the two alleged defamatory letters addressed to the second plaintiff and written by the first defendant stated that copies of the same two letters were extended to third parties, in actual fact copies of the said two letters were never sent by the defendants to the said third parties referred to in the said two letters. He averred that this fact was made known to the plaintiffs by a letter from the second defendant dated 20 February 1997 and addressed to the plaintiffs' solicitors. A copy of the said letter was also exhibited, attached to the first defendant's affidavit filed in support of the application. He again reiterated that the said two alleged defamatory letters were only sent by facsimile to the second plaintiff in Malaysia at his office in the first plaintiff's premises and that no copies were ever sent by facsimile, post or other means to any one else in Malaysia.

Findings of the court

What is surprising is that the plaintiffs failed to file any reply to counter the averments of the first defendant in his affidavit in support of the application. The averments of facts such as the denial that copies were in fact sent to the persons named in the letter, were not challenged in any way by the plaintiffs. Whilst I agree that the plaintiffs might have no evidence to challenge such a denial, all that was required was for the plaintiffs to challenge that fact by requiring strict proof from the defendants that notwithstanding the fact that third party names were mentioned in the said two letters, copies of these two letters were indeed not sent to them.

Another factor the plaintiffs could have raised was that since the said two letters were faxed to the second plaintiff in Malaysia, at his office, there was a possibility that the staff could have read the letters resulting in publication to third parties. There was, however, absolutely no challenge to the facts averred by the defendants.

The defendants have proceeded in this application pursuant to O 12 r 7 of the Rules of the High Court 1980 ('the RHC'). The said rule reads as follows:

> (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction.
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> (2) An application under this rule must be made by summons.

It is trite law that in order to establish that this court has jurisdiction to try this action, the plaintiffs have to prove that the said two defamatory letters were published in Malaysia. In order to constitute publication in Malaysia, the plaintiffs are required to prove that the said letters were published to a third party in Malaysia and not just to the plaintiffs. Since the affidavit of the first defendant clearly denies any publication to any third party and since there is no challenge to that denial I must accept such denial as true and thus accede to the defendants' application. On this ground alone, I decided, without the need to consider the other issues raised, to allow the appeal and to set aside the decision of the learned SAR. Since O 12 r 7 of the RHC does not provide for a stay, I granted the alternative prayer of setting aside this action with costs.

Appeal allowed with costs and decision of the SAR and the action set aside.

Reported by Moy Saw Han